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NO. **89-1770**

Supreme Court, U.S.

FILED

FEB 26 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TeleSTAR, Inc.,

Petitioner;

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent;

**MCI COMMUNICATIONS CORPORATION,
WESTERN TELE-COMMUNICATIONS, INC.,**

Intervenors.

APPENDIX (VOLUME I)

**PETITION FOR WRIT OF CERIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

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**DATE FILED: February 26, 1990
(CORRECTED COPY)**



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47 C.F.R. Section 21.3(b)

(b) Except when the Commission finds under the rules of this part that the public interest, convenience, or necessity would be served by waiver of this requirement, no radio license shall be issued for the operation of any station unless a permit for its construction has been granted by the Commission. No construction or modification of a station has been granted by the Commission. No construction of a station may be commenced without a construction permit, a modified construction permit, or other authority issued by the Commission for the exact construction or modification to be undertaken, except as may be specifically provided for in other sections of this part.

47 U.S.C. Sec. 309(e)

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question

of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any

hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate.

The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

47 U.S.C. 312(a)

Section 312. Administrative sanctions

(a) Revocation of station license or construction permit. The Commission may revoke any station license or construction permit--

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308[47 USCS Sec. 308]

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this ACT or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code [18 USCS Sec. 1304, 1343, or 1464]; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

5 USCS 556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent

consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title [5 USCS 557(d)] sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1420
September Term, 1989
Filed November 27, 1989

TeleSTAR, Inc.

Appellant

V.

Federal Communications Commission

Appellee

MCI Telecommunications Corporation
Western Tele-Communications, Inc.

Intervenors

and Consolidated Case No. 88-1445

BEFORE: Mikva, Edwards, and Ruth B.
Ginsburg, Circuit Judges

O R D E R

Upon consideration of Appellant's
Petition for Rehearing, filed November 6,
1989, it is

ORDERED, by the Court, that the
petition is denied.

PER CURIAM
FOR THE COURT:

CONSTANCE L. DUPRE',
CLERK

BY: Robert A. Bonner/s/
Robert A. Bonner
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1420
September Term, 1989
Filed November 27, 1989

TeleSTAR, Inc.

Appellant

v.

Federal Communications Commission

Appellee

MCI Telecommunications Corporation
Western Tele-Communications, Inc.

Intervenors

and Consolidated Case No. 88-1445

BEFORE: Wald, Chief Judge; Mikva, Edwards,
Ruth B. Ginsburg, Silberman,
Buckley, Williams, D. H. Ginsburg
and Sentelle, Circuit Judges

O R D E R

Appellant's Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE',
CLERK

ROBERT A. BONNER/s/
Deputy Clerk

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 88-1420

September Term, 1989

Filed September 22, 1989

TeleSTAR, Inc.

Appellant

v.

Federal Communications Commission

Appellee

MCI Telecommunications Corporation

Western Tele-Communications, Inc.

Intervenors

and Consolidated Case No. 88-1445

**Appeal from an Order of the
Federal Communications Commission**

**Before: MIKVA, EDWARDS, and ROHN B.
GINSBURG, Circuit Judges.**

J U D G M E N T

This appeal was considered on the record from the Federal Communications Commission and on the briefs and oral arguments of counsel. Upon full review, the court is satisfied that appropriate disposition of the case does not warrant a published opinion. See D.C. Cir. R. 14(c).

The Commission's remand order warned TeleSTAR that, as the record then stood, the FCC had "no basis to reverse the conclusion of both the ALJ and the Review Board that TeleSTAR is unquestionably to be a licensee." Despite that warning, and the reasonableness of the Commission's assignment of the proof burden to the applicant when "the operative facts are peculiarly within the knowledge of [that party]," TeleSTAR chose to stand on the existing record. Under the circumstances here presented, we have TeleSTAR's applications. It is therefore ORDERED AND ADJUDGED that the order from which this appeal has been taken be affirmed.

The Clerk is directed to withhold issuance of the writ herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. R. 15(b)(2).

Per Curiam

FOR THE COURT:

Constance L. Dupre'

CONSTANCE L. DUPRE',

Clerk

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

CC DOCKET NO. 85-202

**In the Matter of
TeleSTAR, Inc.**

**Files Nos.
1743-CF-P-85
through
1757-CF-P-85**

**For Authority to Construct
New Common Carrier Point-to-
Point Microwave Radio Stations**

MEMORANDUM OPINION AND ORDER

**Adopted: May 11, 1988;
Released: May 19, 1988**

By the Commission: Commissioner Dennis
concurring in the result.

I. BACKGROUND

1. This proceeding involves 15 applications filed by TeleSTAR, Inc. for authority to construct common carrier microwave radio stations connecting Salt Lake City, Utah and Denver, Colorado. TeleSTAR constructed substantial parts of its proposed system without construction permits, thereby violating 47 C.F.R. Sec.

21.3. In pertinent part, section 21.3 provides that:

"No construction or modification of a station may be commenced without a construction permit, a modified construction permit, or other authority issued by the Commission for the exact construction or modification to be undertaken, except as may be specifically provided for in other sections of this part."

In an Initial Decision, ALJ Walter C. Miller denied TeleSTAR's applications, finding that TeleSTAR willfully violated section 21.3 and intentionally misrepresented material facts to the Commission about its premature construction. TeleSTAR, Inc., FCC 86D-30 (Apr. 18, 1986). The Review Board affirmed the ALJ's decision, concluding that TeleSTAR willfully violated section 21.3 and that "its principals made serious and numerous misrepresentations to the FCC, and displayed an egregious lack of candor in this

proceeding." TeleSTAR, Inc. 2 FCC Rcd 5.13
Sec. 24(1987).

2. On December 3, 1987. the Commission remanded this proceeding for further evidentiary hearings. TeleSTAR, Inc. (remand order), 2 FCC Rcd 7352 (1987). We said that any supplemental initial decision would be appealable directly to the Commission. 2 FCC Rcd at 7356 Sec. 27. On December 28, 1987, TeleSTAR filed a Petition for Leave to File Petition for Reconsideration, and a Petition for Reconsideration. Comments were filed January 12, 1988 by the Common Carrier Bureau: and a Response was filed January 13, 1988 by Western TeleCommunications, Inc. (WTCI).

3. On January 5 , 1988. Gregory J. Vogt. Chief of the Enforcement Division of the Common Carrier Bureau. requested the General Counsel to meet with the parties in this proceeding to consider the possibility of reaching a negotiated settlement. On

February 4, 1985, representatives of the Office of General Counsel met with the parties to explore the possibility of the parties negotiating a settlement. As a result of the February 4 meeting, the parties agreed to attempt to draft a memorandum of understanding concerning a settlement of this proceeding, and we deferred consideration of TeleSTAR's Petition for Reconsideration pending a further report from the parties. In a letter dated March 11, 1988, Mr. Vogt advised the General Counsel that there were "irreconcilable differences" among the parties and that the settlement negotiations "have broken down." We immediately resumed consideration of TeleSTAR's Petition for Reconsideration on an expedited basis, consistent with the priority of other matters and the efficient disposition of the Commission's business.

While TeleSTAR's Petition for Reconsideration was pending, the ALJ proceeded with the remanded proceeding. In TeleSTAR, Inc., FCC 88M-1113, issued April 13, 1988 and released April 15, 1988, the ALJ dismissed TeleSTAR's applications for failure to prosecute because of TeleSTAR's refusal to present evidence in the remanded hearing. On April 14, 1988, TeleSTAR filed an Urgent Request for Expedited Action asking the Commission to rule on its Petition for Reconsideration before the issuance of the ALJ's dismissal order. TeleSTAR's Urgent Request will be dismissed as moot because it was not filed until after the issuance of the dismissal order. On April 22, 1988, TeleSTAR filed an Appeal of the dismissal order.

5. TeleSTAR argues that in remanding this proceeding the Commission erred in its allocation of the burden of proof. TeleSTAR refused to present further evidence and it

urges the Commission to grant its applications and impose a monetary forfeiture. It asserts, however, that if the Commission is unable to find that TeleSTAR is qualified to be a licensee, the Commission should promptly deny TeleSTAR's applications, so that it can appeal the Commission's determination. In its Appeal of the dismissal order, TeleSTAR again argues that the record is complete and that the Commission erred in assigning the burden of proof and in remanding this proceeding.

II. DISCUSSION

A. The Remand Order

6. We do not lightly deny any application. In the remand order we found that are "conflicts and gaps. . . which makes it impossible to resolve this proceeding with sufficient certitude to determine whether we should grant or deny TeleSTAR's applications." 2 FCC Rcd at 7353 Sec. 10. It was, therefore, with an abundance of

caution, and because of the need for new, competitive common carrier service, that we remanded this proceeding for additional hearings to afford the parties an opportunity to fill in gaps in the record, and to allow TeleSTAR an opportunity to establish its qualifications. The ALJ was direct to take further evidence concerning: (1) how TeleSTAR's principals developed their incorrect understandings of the Commission's rules: (2) their involvement in the inconsistent and incorrect statements made to the Commission: and (3) when they became aware of the Commission's prohibition against premature construction. We anticipated that such evidence, if provided, could help determine TeleSTAR's qualifications.

7. Although we specifically found that TeleSTAR failed to establish its qualifications to be a licensee on the basis of their present record. TeleSTAR refused to

present further evidence. The Dismissal of TeleSTAR's applications moots its Petition for Reconsideration. However, in the interest of ensuring that TeleSTAR has a full opportunity to have its arguments reviewed by the Commission, we will grant the Petition for Leave to File Petition for Reconsideration. We will consider both the Petition for Reconsideration and the Appeal of the ALJ's dismissal order. We will reexamine the Board's Decision and resolve this proceeding, as TeleSTAR requests, on the basis of the current record. TeleSTAR's Petition for Reconsideration, the Application for Review, and the related pleadings listed in the remand order. 2 FCC Rcd at 7352 1.

8. We recognize that TeleSTAR provided affirmative evidence supporting its contentions. However, that evidence must be evaluated in light of circumstantial and other conflicting evidence in the record. When consideration is given to the full

record in this proceeding, the preponderance of the evidence establishes that TeleSTAR has both misrepresented material facts and exhibited a lack of candor in its prosecution of these applications. As set forth below, TeleSTAR failed to establish both that it is qualified to be licensee and that the public interest will be served by the grant of its application. *Steadman v. United States*, 450 U.S. 91, 100-02 (1981). Moreover, in light of TeleSTAR's failure to supplement the record, the ALJ properly dismissed its applications for failure to prosecute, providing a separate and distinct basis for denying TeleSTAR's applications.

B. TeleSTAR's Qualifications

9. TeleSTAR argues in both its Petition for Reconsideration and its Appeal that the Commission erred in holding that it had the burden of proof with respect to the factual issues. TeleSTAR argues that the ALJ failed to provide specific demeanor findings in

support of his candor conclusions: that its principals believed that TeleSTAR could begin constructing facilities immediately after completing the coordinating process for the frequencies to be used, without a specific Commission authorization: and that TeleSTAR acted in good faith because it did not start construction until after the completion of frequency coordination.

10. The Bureau argues that the ALJ failed to make adequate demeanor findings in support of his candor conclusions. It asserts that the Commission should review the record and make its own findings. The Bureau asserts that the record supports a conclusion that "somewhere along the way the principals adopted the mistaken impression that no preconstruction permit was required...[and that] it is highly plausible that the principals truly believed that no preconstruction approval was required." Bureau's February 24, 1987 Comments at 4-5.

The Bureau also argues that TeleSTAR's principals are "forthright, credible witnesses." Comments in Opposition for Reconsideration at 5. It urges the Commission to grant TeleSTAR's applications and impose a substantial forfeiture.

1. Burden of Proof

11. Before reaching the merits of TeleSTAR's contentions, we must first address its objections concerning the allocation of the burden of proof. The remand order said that in the burden of proceeding with the production of evidence and the burden of proof are on TeleSTAR. TeleSTAR argues that the designated issues are predicated on allegations in a petition to deny, as they were in this case, the burdens of proof and proceeding are generally placed on the parties raising the allegations. D and E Broadcasting, 1 FCC 2d 78 (1965). It asserts that allocating the burden of proof to TeleSTAR is unfair.

because it would require TeleSTAR to "negative all possibilities of misconduct." Lamar Life Insurance Co., 5 FCC 2d 37, 40 (1966). TeleSTAR contends that we misread the hearing designation order, because it allocated the burden of proof to TeleSTAR only with respect to the conclusory issues, TeleSTAR., 50 Fed Reg. 27055 (July 1, 1985). 12. Although D and E held that the burden of proof is generally placed on "the party making the charges." it recognized "that there may be cases in which departure from this general practice may be justified." 1 FCC 2d at 80. In such cases, the Commission must explain its reasons for assigning the burden of proof to an applicant. Id. In the hearing designation order, the Bureau appended the following footnote to the ordering clause, requiring TeleSTAR to adduce evidence on all issues and assigning the burden of proof on the conclusory issues to TeleSTAR:

Where an applicant, against whom charges of misconduct have been raised, has within its peculiar knowledge the facts regarding the alleged misconduct, the applicant will have the burdens of production and proof on such issues. See generally, Granbury Communications Co., 68 F.C.C. 2d 966, 969(1978); Miami Broadcasting Corp., 11 F.C.C. 2d 920, 923(Rev. Bd. 1968). 50 Fed. Reg. at 20758 n.19. For reasons explained below, this footnote provided the required explanation for putting the burdens of proceeding and proof on TeleSTAR as to the issues for which the facts are peculiarly within its knowledge.

13. In this proceeding, the factual issues concern whether TeleSTAR's premature "construction was effectuated with the knowledge that the construction was in violation of Section 21.3" and whether TeleSTAR "Intentionally misrepresented material facts to the Commission." 50 Fed.

Reg. at 20758 16. The operative facts with respect to these issues are peculiarly within the knowledge of TeleSTAR's principals. Thus, TeleSTAR properly bears both the burden of proceeding and the burden of proof with respect to those issues.

14. Lamar Life, cited by TeleSTAR, does not require a contrary result. In Lamar Life the alleged misconduct involved "acts of omission" and the issue did "not concern matters that are peculiarly within the knowledge of the applicant and unknown or inaccessible to the complaints." 5 FCC 2d at 39 7. Although Lamar Life recognized that it would be unfair "to require an applicant to negative all possibilities of misconduct of a generalized sort," such is not the case here. The issues here concern affirmative acts - TeleSTAR's premature construction and its representations to the Commission. TeleSTAR's defense is that its principals were proceeding in good faith. The remand

order directed the ALJ to conduct further hearings to elicit evidence in order to clarify the differing and inconsistent arguments in TeleSTAR's pleadings concerning the premature construction: explain how its principals developed their erroneous understandings of the Commission's rules: and to supplement their testimony concerning their knowledge of the construction permit requirement. 2 FCC Rcd at 7354-56 14-26. Clearly, because the nature of these matters concerns facts within the peculiar knowledge of TeleSTAR's principals, it is not unfair or unreasonable to require TeleSTAR to present evidence concerning the activities of its principals or to carry the burden of proving that its principals were proceeding in good faith.

15. TeleSTAR argues that footnote 19 of the hearing designation order is not binding because it conflicts with the ordering clause: and that the Granbury Communications and Miami Broadcasting

proceedings, cited in the footnote, do not support allocating both the burden of proceeding and the burden of proof to the applicant. However, TeleSTAR's argument based on case law does not change the fundamental fact that the Communications Act itself, 47 U.S.C. 309(e), provides "that with respect to any issue presented by a petition to deny or a petition to enlarge issues, such burdens [of proceeding and of proof] shall be as determined by the Commission." The ordering clause specifically assigns the burden of proceeding on the factual issues and the burden of proof on the conclusory issued to TeleSTAR, 50 Fed. Reg. at 20758 17. Paragraph 17, however, is silent as to the burden of proof of the factual issues. That matter is addressed in footnote 19. Thus, nothing in footnote 19 is inconsistent with the remainder of the designation order. Moreover, in both the Granbury

Communications and Miami Broadcasting proceedings the burdens of proof on factual issues were allocated to the applicants. Granbury Communications, 68 FCC 2d at 969; Miami Broadcasting, 11 FCC 2d at 293. Thus, those proceedings fully support the allocation of the burden of proof with respect to the factual issues to TeleSTAR.

2. Representations Relating to TeleSTAR's Premature Construction

16. Representations in TeleSTAR's Applications: TeleSTAR began constructing its facilities in September 1984. In December 1984, TeleSTAR's outside counsel for communications matters sent TeleSTAR copies of Part 21 of the rules, putting TeleSTAR on constructive if not actual notice of the prohibition against premature construction. TeleSTAR Ex. 14. On January 4, 1985, TeleSTAR's president, Noel Stewart certified TeleSTAR's applications, attesting that he had reviewed the applications and that they were true and complete to the best

of his knowledge. The applications falsely represented that "TeleSTAR proposes to construct" its facilities. Nothing in the applications even intimated that TeleSTAR had already started construction. TeleSTAR's principals did not object to the representation concerning its intent to construct, nor did they advise their FCC counsel that TeleSTAR had already started construction. Tr. at 442-44.681. Noel Stewart testified that the application was prepared by outside counsel for communications matters, that he had not seen all of the exhibits when he signed the applications, and that he did not know if he "had even seen this particular part" of the application. Tr. at 44-2-43. TeleSTAR's counsel was not aware of the construction until after the applications were filed, TeleSTAR Ex. 3.

17. Noel Stewart also certified that TeleSTAR had a copy of Part 21 and that he

was "familiar with all rules affecting the proposed operation." Application Q, 33.

However, TeleSTAR later disavowed the statements in the applications, asserting that Noel Stewart did not have an adequate opportunity to read the rules. TeleSTAR's Motion for Summary Decision at 2 (filed Sept. 30, 1985). Noel Stewart later testified that he "had a short time to review the Rules" and that he could "not recall reading" section 21.3 or any other information indicating that there is a prohibition against construction without a permit, TeleSTAR Ex. at 12: Tr. at 338.

18. Conflicting Arguments and Representations in TeleSTAR's Pleadings: TeleSTAR advanced one explanation for its premature construction and then it abandoned that explanation for a conflicting explanation when it became apparent that its initial contentions were inconsistent with the facts. Thus, on March 21, 1985, TeleSTAR filed an Opposition to Petition to Dismiss

its Applications, arguing that section 21.3 "is very amenable to misinterpretation" and that it understood section 21.3 of the rules to prohibit only the "installation and connection of hertzian wave propagation equipment." TeleSTAR EX. 1, Attachment K at 30-31. The Board found that TeleSTAR's explanation was not credible because its construction in fact included antennas and waveguides, which are "hertzian wave propagation equipment." 2 FCC Rcd at 6 7.

19. TeleSTAR abandoned the argument made in its March 21 Opposition in the subsequent Motion for Summary Decision filed September 20, 1985. TeleSTAR attributed the previous argument - that it misunderstood the Commission's rules - to its outside counsel for communications matters. Counsel testified that he drafted the pleading without ever attempting to determine if the Stewarts had read the rules Tr. at 849-50. TeleSTAR argued in the September 20 motion, for the first time, that Noel Stewart was

not "aware of or had ever seen" section 21.3 before it started construction, Motion for Summary Decision at 2. Noel Stewart certified that the March 21 opposition was prepared under his supervision and that the facts contained in the opposition were true. TeleSTAR Ex. 1 Attachment K at 85, Noel Stewart explained the change, asserting that the opposition was prepared by TeleSTAR's communications counsel, that Stewart did not read it until after it was served, and that after reading the opposition "nothing bothered" him. Tr. at 346. It is clear, however, that the representations concerning Noel Stewart's knowledge of the rules -- in the application and the March 21 opposition, and in the September 20 motion -- are patently inconsistent, and that at least one of the documents contained representations which are false.

20. TeleSTAR erroneously argues that the remand order accepted TeleSTAR's

contention that its principals did not become aware of the prohibition against premature construction during the course of their review of Part 21 before the certification of TeleSTAR's applications. The remand order merely recited the showing "that TeleSTAR's certification practices were sloppy and ill-advised" and concluded that those particular matters "standing alone do not warrant denial of its applications." 2 FCC Rcd at 7354 13. That conclusion, however, does not alter the fact that TeleSTAR submitted patently false information in either its pleadings or its applications, and that the false statements were the direct result of Noel Stewart's deficient certification practices. Noel Stewart's carelessness raises questions about the Commission's ability to rely on TeleSTAR's representations in the future and, when considered in the light of the full record in this proceeding, it must be considered as part of the evidence

reflecting adversely on TeleSTAR's qualifications to be a licensee. We reiterate that our remand order gave TeleSTAR the opportunity to submit additional, mitigating evidence: but TeleSTAR chose not to do so.

21. Documents Drafted by TeleSTAR's Principals: Noel Stewart and his brother, Doyal Stewart, who is Chairman of TeleSTAR, testified that they believed TeleSTAR could begin construction after the completion of the frequency coordination process even if TeleSTAR had not yet received a written authorization from the Commission. Tr. at 327-29, 528-31. However, this testimony is inconsistent with statements contained in documents drafted by the Stewarts and distributed to TeleSTAR's shareholders.

22. TeleSTAR issued a Private Placement Memorandum (PPM) dated January 16, 1984 to explain its proposed operations to prospective investors. Doyal Stewart drafted

the section of the PPM relating to site construction, which states that:

"Construction of the sites will begin upon a preclearance release from the FCC for construction to begin. This order is obtainable from the FCC usually after frequencies have been out on 'user notification'." Tr. at 518-20: TeleSTAR Ex. 1 Attachment E at 31. Doyal Stewart also drafted a flow chart as part of the PPM which indicated that TeleSTAR would get "FCC Pre-Build Orders" before constructing facilities. Tr. at 518-20: TeleSTAR Ex. 1. Attachment E at 64. Although the PPM used different terminology than the Commission's rules, it conveyed a clear message that Commission authorization was required before TeleSTAR could start building its facilities.

23. TeleSTAR's awareness of a need for a construction permit was also shown by other contemporaneous documents. On April

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17, 1984, Noel Stewart wrote to TeleSTAR's shareholders that the Commission's processes had been changed and that "the FCC now requires only that a Construction Permit (CP) be obtained and that applications have been filed for frequency licenses." TeleSTAR Ex. 1, Attachment G at 3(emphasis added). In a letter dated June 7, 1984, Noel Stewart discussed the chronological sequence of the steps to be taken by TeleSTAR. He wrote that:

The events ahead are: (1) Prior coordination (User Notification).(2) construction acquisitions and preparations. (3) site acquisition and formal leases on privately owned sites. (4) implementation of Phase II construction (low cost items and prefabrications). (5) finalization of User Notification coordination. (6) FCC granting of CP and final constructions.

TeleSTAR Ex. 1, Attachment H at 7 (emphasis added). The letter continued:

Some preliminary constructions of towers and other items will soon be underway. After the 30-day User Coordination is over--anticipated time-frame is mid July--some private sites will be obtained and the construction phase will begin on certain sites. Upon finalization of public notification and granting of CP by the FCC the FCC the construction process will be well underway. Tower and shelter designs are being completed now in preparation for the construction phase.

Id. Although this letter recognized the need for a construction permit, it advised investors that TeleSTAR intended to start construction before obtaining FCC permits.

24. In a letter dated July 14, 1984, TeleSTAR advised its shareholders that the frequency coordination process was nearing completion and that it was hoping to complete substantial construction before

receiving a permit. It advised investors that:

After prior coordination, as previously mentioned, a 435 Form will be filed with the FCC for an FCC construction permit (CP). The FCC CP will usually be granted after an additional 30-day public notice by the FCC.

Hopefully, before receiving the FCC CP, most of the private sites will be constructed which will leave 2 - 3 remaining sites to be completed during September after receiving the FCC CP, TeleSTAR Ex. 1, Attachment I at 4.

25. The PPM and letters to TeleSTAR's shareholders contradict TeleSTAR's representations discussed in paragraphs 18 and 19, above, and they establish that TeleSTAR knew that it needed a construction permit. The letters showed that TeleSTAR intended to construct its facilities before it received a permit from the Commission. TeleSTAR argues that this admission

establishes its good faith because it would not have knowingly admitted its intention to construct facilities in violation of section 21.3. TeleSTAR had provided no basis for determining a notice for these statements. The remand order specifically advised TeleSTAR that we could not exonerate it on the basis of these statements without further information 2 FCC Rcd at 7355 19. TeleSTAR did not present such evidence on remand.

26. Moreover, TeleSTAR amended the PPM at the insistence of prospective investors, to include an agreement for the dissolution and liquidation of the company if it was unable to commence operations by January 1, 1985. FCC 86D-30 at 14,. The ALJ found that TeleSTAR started construction without a permit in order to meet its commitment to start operations by January 1, 1985. FCC 86D-30 at 25. Although we do not conclude that TeleSTAR's statements in the letters to

its shareholders were motivated by its desire to placate anxious investors, the record, standing alone, does not warrant inference of good faith predicated on TeleSTAR's statements in those letters.

Because TeleSTAR has not otherwise explained its reference to the need for a construction permit in the PPM and letters and because those documents show that it was aware of the construction permit requirement, these matters also establish that TeleSTAR is not qualified to be a Commission licensee.

27. The Stewarts' Erroneous

Understanding of the Commission's CP

Requirement: The burden of proof is on

TeleSTAR to establish its qualifications. In

light of the significant evidence reflected

in TeleSTAR's documents referring to

"pre-build orders" and construction permits.

TeleSTAR had to present persuasive evidence

establishing a genuine good faith belief

that it could construct without a permit.

Noel Stewart testified: "Based on

information available to us and our impressions, I believed . . . that FCC approval was necessary before radio equipment was installed or operated, but that it was not necessary before site construction began." TeleSTAR Ex. 1 at 5. Both Stewarts testified that after discussions with equipment suppliers and industry representatives they came away with the impression that they did not need a construction permit before starting construction. TeleSTAR Ex. 1 at 5-7; Tr. at 524. However, TeleSTAR presented no disinterested witness to corroborate this testimony. Moreover, they admitted that they did not consult with outside communications counsel about when they could start construction Tr. at 536. Noel Stewart also admitted that no one ever told him that he did not need a construction permit to start construction of TeleSTAR's system. Tr. 465-66.

28. The remand order found that TeleSTAR had failed to establish how the Stewarts developed their erroneous interpretation of the rules. 2 FCC Rcd at 7355 21. We said that without further evidence to show that the erroneous interpretation in fact resulted from a confusion about the rules, we could not find TeleSTAR qualified to be a licensee. Id. at 7355 23. The remand order specifically afforded TeleSTAR's principals an opportunity to testify about the specific nature of their conversations with industry representatives and to present those representatives as witnesses. Id. at 7355 20-23. In this regard, we find it hard to believe that the Stewarts would have solicited investments, made representations and expended funds based on "impressions" without first checking to ensure that those representations were accurate. TeleSTAR, nonetheless, has declined to present such pertinent evidence.

29. In any event, the limited evidence that TeleSTAR did present as to its industry contacts establishes, if anything, that the Stewarts were not misled by industry contacts. In an affidavit submitted by TeleSTAR, Edsel Davis of Spectrum Planning, Inc. stated: "I know that I would not have said construction without an FCC permit was permissible." Motion for Summary Decision. Ex. 7: Tr. at 545-46.

30. Similarly, we are unable to make any exculpatory inferences from the testimony of J. Craig Carmen, TeleSTAR's local corporate attorney, who investigated whether TeleSTAR's principals had prior knowledge of the rules. Carmen concluded that: (1) the Stewarts were aware of the need for a construction permit when they drafted the PPM; (2) after subsequently meeting with representatives of Spectrum Planning, they believed that TeleSTAR could start construction after receiving a

"Preliminary Clearance Notification" (PCN); and (3) TeleSTAR did not start construction until it received clearance from Compucon, Inc. TeleSTAR Ex. 1, Attachment V. Carmen referred to statements by Noel Stewart that he believed a "Preclearance construction order" was required when TeleSTAR issued the PPM, but that discussions with consulting contractors from Spectrum Planning and Compucon caused Noel Stewart to believe that TeleSTAR could start preliminary construction without a Commission authorization, Tr. at 273-77. Carmen testified, however, that Stewart could not point to any specific conversation where industry representatives told him that the construction was permitted, and that representatives of Spectrum Planning and Compucon had told Carmen that they would not have advised TeleSTAR that it could begin construction without a construction permit. Tr. at 263-65, 276, 288. The record does not

include any other specific evidence concerning the nature of the conversations which these representatives had had with the Stewarts. In view of the limited evidence in the record, we can give no credence to the Stewarts' self-serving and otherwise unsupported testimony that they gained their erroneous understandings of the rules from their contracts with industry representatives.

31. Doyal Stewart's specific explanation of why he thought construction was permissible further strains credulity. He testified that he "never thought that that they [the FCC] would be concerned with the actual construction permit . . . [he] would be getting from the city and county wherever we were building." Tr. at 533 (emphasis added). This statement is inconsistent with the portion of the PPM written by Doyal Stewart that clearly said that a "pre-build order" from the Commission

was a prerequisite for construction. The above testimony, when compared with the precise language of the PPM prepared by Doyal Stewart, is a further indication of TeleSTAR's lack of candor in its representation to the Commission.

32. Representations Concerning When TeleSTAR Discovered That Its Construction Violated the Rules: TeleSTAR maintains that it did not know that its pre-construction was prohibited until it was told by David Irwin, its counsel for FCC matters, and that it ordered the construction stopped after consulting with Irwin. TeleSTAR Ex. 1 at 14. It is undisputed that work on the construction was completely shut down by January 25, 1985. TeleSTAR Exs. 16, 17, 18. What is disputed is whether the conversation with Irwin occurred before or after this date. TeleSTAR's witnesses claimed that on January 23, 1985, Steve Amundsen (TeleSTAR's director of marketing) was advised by a representative from Compucon that WTCI was

inquiring about the premature construction. Amundsen testified that he immediately called Irwin, who told him that TeleSTAR should stop construction; that he discussed the Irwin call with the Stewarts; and that TeleSTAR ordered construction stopped. TeleSTAR Ex. 1 at 13-14; TeleSTAR Ex. 2 at 6; Tr. at 331, 596-98. Irwin, however, testified that he did not learn about the premature construction until January 29 - that is, four days after TeleSTAR had stopped construction Tr. at 694.

33. TeleSTAR argues that its principals' testimony is corroborated by telephone and billing records, TeleSTAR Exs. 2, 9. These records indicate that on January 23 and 29 the following calls - by TeleSTAR to Compucon or Irwin & Lesse or Carmen, or by Compucon or Irwin & Lesse to TeleSTAR -

were made at the following (Mountain Daylight) times:

January 23

Time	Duration
8:18 a.m.	3 min. to Compucon
11:48 a.m.	10.9 min. from Compucon
12:53 p.m.	6.1 min. from Compucon
1:16 p.m.	7 min. to Irwin & Lesse
1:34 p.m.	4 min. to Irwin & Lesse
1:55 p.m.	4 min. to Compucon
2:53 p.m.	6 min. to Craig Carmen

January 29

Time	Duration
7:55 a.m.	4 min. from Irwin & Lesse
8:16 a.m.	2 min. to Irwin & Lesse
8:32 a.m.	14 min. to Compucon
8:47 a.m.	1 min. to Compucon
8:50 a.m.	4 min. from Irwin & Lesse

TeleSTAR Ex. 9 TeleSTAR also asserts that Bureau counsel found that its principals testified truthfully about the date on which they first became aware of the prohibition against premature construction.

34. This evidence is inconclusive and therefore not exculpatory. The telephone records show only that calls were made on both days. Those records would be consistent

with a finding that Irwin had told Amundsen that the construction was prohibited on either day. Irwin testified that he could not have been notified about the construction on January 23, because the call from Amundsen was overheard by Frank Inserra (an associate) and because he also immediately discussed the call with Sylvia Lesse (his partner), and neither Inserra nor Lesse was in the office on January 23, Tr. at 694, 716-17, 900-01.

35. Based on the evidence in the record, we affirm the findings of the ALJ that TeleSTAR's principals lacked candor by testifying that they were unaware of the prohibition against premature construction until notified on January 23 by Irwin. The telephone records cited by TeleSTAR are, as noted above, inconclusive. Even the Bureau, which urges the Commission to accept the Stewarts' testimony, recognized that the telephone records are inadequate to

determine when TeleSTAR discussed the premature construction with Irwin. Bureau's Proposed Findings filed December 20, 1985, at 14 37. TeleSTAR spent more time on phone calls on January 23 than on January 29. On January 23, however, TeleSTAR filed its applications, and this could explain the difference.

36. We note, further, that the testimony of TeleSTAR's principals is also in conflict with a predesignation pleading filed by TeleSTAR. In a Response to Request for Rejection of Applications, filed February 11, 1985 (TeleSTAR Ex. 1, Attachment S), TeleSTAR represented that Amundsen did not become aware of the inquiries about the premature construction until January 24 and that he did not call Irwin until January 29 - the same date that Irwin testified he received the call.

37. We also find that Irwin's testimony is simply more credible on the

issue of when the call was made. Whereas TeleSTAR's telephone records do not indicate the subject matter discussed, Irwin's contemporaneous billing slip indicated that on January 29 he had discussions concerning the premature construction, TeleSTAR Ex. 12. The billing slip for January 23 includes no similar notation. More importantly, Irwin presented clear explanation of why he believed the call was made on January 29 instead of January 23. In contrast, Amundsen's direct testimony initially placed the call on January 24 (TeleSTAR Ex. 2 at 6) and his explanation of why he changed his testimony to January 23 is unconvincing. Although Amundsen testified that he consulted telephone logs, he did not explain why those logs convinced him that January 23 was correct, nor did he otherwise provide any corroboration for his changed testimony, Tr. at 596-97. Similarly, Noel Stewart's direct testimony placed the telephone conversation during which Irwin advised

TeleSTAR to stop construction "around the last of January"; moreover, he did not adequately document or explain why he subsequently changed his testimony to claim that the critical Irwin call was made on January, TeleSTAR Ex. 1 at 13: Tr. at 329-32.

38. TeleSTAR also had reason to be less than candid about the date when Irwin told TeleSTAR that construction without a permit was improper. TeleSTAR argued throughout this proceeding that it had been unaware of the construction permit requirements. However, it is undisputed that construction on TeleSTAR's proposed facilities was halted by January 25. Given this fact, it was imperative for TeleSTAR to claim that the premature construction conversation with Irwin occurred on January 23. Otherwise, an inference could be drawn that the construction was halted as soon as inquiries were made because TeleSTAR's

principals already knew that the construction was improper and that it could not be justified.

39. The remand order found a lack of evidence explaining how or why TeleSTAR's principals concluded that the discussion concerning premature construction occurred on January 23. We remanded this proceeding to adduce further evidence concerning when Irwin advised TeleSTAR that the construction was prohibited. 2 FCC Rcd at 7356 26. As previously discussed, the telephone records do not support the testimony of TeleSTAR's principals, and TeleSTAR has failed to supplement its initial showing. Thus, the available record evidence established that TeleSTAR's principals lacked candor in their testimony concerning when they became aware of the prohibition against premature construction.

40. The Bureau's Pleadings: The Common Carrier Bureau argues that the Stewarts and

Amundsen were "forthcoming, credible witnesses." Comments filed January 12, 1988, at 12. It accepted their testimony that Irwin told them open January 23 that the construction was prohibited. The Bureau argues that TeleSTAR would not have stopped the work on its facilities without being advised to do so by Irwin. Proposed Findings filed December 20, 1985 at 14 38.

41. On January 23, 1985, TeleSTAR became aware of WTCI's inquiries about its premature construction. It is plausible that TeleSTAR stopped construction in response to these inquiries. The Bureau admitted that it was "at a loss" to explain the credible testimony of Irwin. Lesse and Inserra is also supported by TeleSTAR pleadings and contemporaneous billing slips. On the other hand, the claim that TeleSTAR's principals were unaware of the construction permit requirement is inconsistent with the PPM and the letters to TeleSTAR's shareholders. In view of the gaps in the record, the contrary

evidence, and the failure of TeleSTAR to present explanatory, exculpatory evidence, we cannot find that TeleSTAR's witnesses were candid in their testimony.

42. TeleSTAR's Premature Construction:

The parties have stipulated and the record supports the finding that TeleSTAR constructed facilities without a construction permit in violation of 47 C.F.R. 21.3.

43. The ALJ's Demeanor Findings: The

remand order found that the ALJ's credibility conclusions were not supported by specific demeanor finding. 2 FCC Rcd at 7353 11. An ALJ's credibility rulings "should be supported by some specification in order to be accorded significant weight." Gulf Coast Communication, Inc. 81 FCC 2d 499, 506 (Rev. Bd. 1980), recon. denied. FCC 82-128 (Apr. 16, 1982). Where an ALJ fails to provide a detailed demeanor analysis, we can make our own findings based on the

record evidence, Id. 81 FCC 2d 306. We have not relied on the ALJ's decision or findings in this proceeding. In order to ensure that the record fully supports the denial of TeleSTAR's application, we have reviewed the testimony and exhibits and made our own determinations on the disputed issues.

44. The Dismissal of TeleSTAR's Applications: The remand order afforded TeleSTAR a further opportunity to establish its qualifications to be a licensee. The order listed specific deficiencies in TeleSTAR's showing, where further information -- if submitted -- would help establish TeleSTAR's qualifications. The ALJ was directed to conduct further hearings to elicit evidence concerning the record deficiencies. TeleSTAR's argument that the record is complete is without merit. For example, the Stewarts testified that they developed a misunderstanding of the Commission's rules after conversations with

industry representatives. TeleSTAR, however, never described the conversations and it failed to present the industry representatives as witnesses to bolster the Stewarts' self-serving, unsupported testimony. Its explanations concerning the drafting of documents and of when it allegedly became aware of section 21.3 are also unconvincing. TeleSTAR's refusal to exchange witnesses or exhibits and its decision to rest on the existing record is fully justified. TeleSTAR's dismissal of its applications for failure to prosecute and stands as a separate and distinct basis for the denial of its applications. At a minimum, TeleSTAR should have called as witnesses its primary contacts and it could have presented its principals as witnesses so that the court could further examine on the matters raised in the remand order. We will, therefore, deny TeleSTAR's appeal and affirm the ALJ's dismissal of its applications.

3. Conclusions Regarding TeleSTAR's Basic Qualifications

45. The only substantial evidence supporting TeleSTAR's version of the facts is the unsupported, self-serving, and at times self-contradictory testimony of its principals. Although TeleSTAR had the burden of establishing its qualifications, it did not present documentary or other supporting evidence that would corroborate or otherwise demonstrate the credibility of its witnesses.

46. In remanding this proceeding, we listed specific gaps and inconsistencies in the record, and we stated why we were unable to find TeleSTAR qualified to be a licensee. TeleSTAR declined to provide additional evidence for the record. In view of the conflicts between the testimony of TeleSTAR's witnesses and the other evidence, we find that the record fully supports the findings of the ALJ and the Board that the preponderance of the circumstantial,

documentary and other evidence establishes that TeleSTAR has misrepresented material facts and exhibited lack of candor in its prosecution of the applications. Consequently, we do not conclude that TeleSTAR is basically qualified to be a licensee and that grant of its applications would serve the public interest.

47. If this is merely a case of premature construction, a lesser penalty such as a monetary forfeiture might be appropriate. For example, in *Eagle Telecommunications*, 3 RR 2d 1243(1985), recon. denied, 3 RR 2d 1249(1986), we imposed a forfeiture of \$20,000 for the unauthorized construction and operation of cable television facilities by a telephone carrier. However, in addition to the violations of section 21.3 there are TeleSTAR's misrepresentations and lack of candor, and its failure to prosecute its applications in the demanded proceeding.

48. In Policy Regarding Character Qualifications in Broadcast Licensing. 101 FCC 2d 1179. 1211 (1986), we stated that it is "necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees." The policies relevant to an applicants' character in the broadcast context differ from those in the common carrier context. Id. at 1202 n.52. But those differences are not pertinent here because the character issues raised involve TeleSTAR's relationship to the Commission and the integrity of the Commission's processes, not TeleSTAR's status as a common carrier. Lack of candor and misrepresentation are sufficient grounds for the adverse action here. Password, Inc., 76 FCC 2d 465, 519 121 (1960), recon. denied.

86 FCC 2d 437, 441 10 (1981); Superior Communications Co., 57 FCC 2d 772, 776 19 (1976).

49. As set out above, we have closely examined the record in this proceeding. Based on that record, it is clear that TeleSTAR violated the rules by its premature construction. TeleSTAR also submitted patently false information as a result of Noel Stewart's deficient certification practices. It also made misrepresentations of material facts and exhibited a lack of candor: (1) in its applications which falsely represented that TeleSTAR proposed to construct its facilities, (2) in its pleadings filed March 21 and September 20, 1985, which contained inconsistent and contradictory explanations for its premature construction, and (3) in its principals' self-serving testimony concerning their understanding and knowledge of the Commission's construction permit requirement, which was unsubstantiated and

rebutted by the other record evidence. The record, therefore, requires us to conclude that TeleSTAR is not qualified to be a licensee. We further find that TeleSTAR failed to prosecute its applications in the remanded proceeding, that its applications were properly dismissed by the ALJ and that its failure to prosecute is a separate and independent-ground for the denial of its applications for new microwave radio stations.

III. ORDERS

50. ACCORDINGLY, IT IS ORDERED, that the Petition for Leave to File Petition for Reconsideration filed December 28, 1987 by TeleSTAR, Inc. is GRANTED.

51. It is further ordered, That the Petition for Reconsideration filed December 28, 1987 by TeleSTAR, Inc. IS GRANTED to the extent indicated herein and in all other respects IS DENIED.

52. IT IS FURTHER ORDERED, That the Application for Review filed February 9,

1987 by TeleSTAR, Inc, IS GRANTED to the extend indicated herein and in all other respects IS DENIED.

53. IT IS FURTHER ORDERED, That the Urgent Request for Expedited Action, filed April 14, 1988 by TeleSTAR, Inc. IS DISMISSED.

54. IT IS FURTHER ORDERED, That the Appeal filed April 22, 1988 by TeleSTAR, Inc., IS DENIED.

55. IT IS FURTHER ORDERED, That the applications for authority to construct new Common Carrier point-to-point microwave radio stations filed by TeleSTAR, Inc. (File Nos. 1743 CF-P-85 through 1757 CF-P-85) ARE DENIED and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS
COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTE

No. 1 Also before the Commission are Comments filed by the Common Carrier Bureau and an Opposition filed by Western Tele-Communications Inc. on May 9, 1988. These pleadings were not considered in our determination to deny TeleSTAR's appeal.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 88M-1113
3083

In the Matter of)	CC DOCKET NO. 85-202
TeleSTAR, Inc.)	File No. 1743-CF-P-85
)	through 1757-CF-P-85
)	
For Authority to)	
Construct Common)	
Carrier Point-to-)	
Point Microwave)	
Radio Stations)	

MEMORANDUM OPINION AND ORDER

Issued: April 13, 1988;
Released: April 15, 1988

1. We held a further prehearing conference on April 13, 1988. There the Presiding Officer ruled that:

"TeleSTAR Inc.'s fifteen applications (File Nos. 1743-CF-P-85 through 1757-CF-P-85) for authority to construct new common carrier point-to-point microwave stations between Salt Lake City, Utah and Denver, Colorado, ARE DISMISSED with prejudice for failure to prosecute."
This Order CONFIRMS that ruling. A brief explanation follows:

Explanation

2. The Commission remanded this case on December 3, 1987 (FCC 87-384). They ordered TeleSTAR, the bearer of the burden of proceeding and the burden of proof on the specified issues, to present more evidence on four specific topics. They also called on the Judge to conduct an expedited hearing, and issued a Supplemental Initial Decision.

3. In remanding, the Commission expressed their concern with a record filled with gaps, inconsistencies, and numerous unanswered questions. The Presiding Officer responded procedurally to those concerns. He immediately issued two prehearing orders.

4. In the first prehearing order, the Presiding Officer called a further prehearing conference for April 6, 1988, ordered TeleSTAR to exchange their further evidence and a list of witnesses on that date, set an evidentiary admission session for April 19, 1988, scheduled the remanded

hearing to begin on May 2, 1988, and blocked off five days for that remanded hearing (FCC 87M-3240, released December 10, 1987).

5. A short time later, and after studying the Commission's remand order further, the Trial Judge became convinced that it would take more than five hearing days to try the expedited proceeding so he issued a second prehearing order (FCC 87M-3298), released December 17, 1988). There he increased the number of scheduled hearing days from five to thirteen and explained why.

6. TeleSTAR then sought reconsideration of the Commission's remand order on December 28, 1987. In essence they called on the Commission to quit straddling the fence. They argued that everyone in the case believed that sufficient evidence had been adduced to support a decision one way or another, and urged the Commission to

section of the PPM relating to site construction, which states that: construction of the sites will begin upon a clearance release from the FCC for construction to begin. This order is obtainable from the FCC usually after agencies have been out on 'user notification'." Tr. at 518-20: TeleSTAR Ex. Attachment E at 31. Doyal Stewart also prepared a flow chart as part of the PPM which indicated that TeleSTAR would get "FCC Build Orders" before constructing facilities. Tr. at 518-20: TeleSTAR Ex. 1. Attachment E at 64. Although the PPM used different terminology than the Commission's, it conveyed a clear message that Commission authorization was required before TeleSTAR could start building its facilities.

23. TeleSTAR's awareness of a need for construction permit was also shown by contemporaneous documents. On April

reflecting adversely on TeleSTAR's qualifications to be a licensee. We reiterate that our remand order gave TeleSTAR the opportunity to submit additional, mitigating evidence: but TeleSTAR chose not to do so.

21. Documents Drafted by TeleSTAR
Principals: Noel Stewart and his brother Doyal Stewart, who is Chairman of TeleSTAR, testified that they believed TeleSTAR to begin construction after the completion of the frequency coordination process even though TeleSTAR had not yet received a written authorization from the Commission. Tr. 327-29, 528-31. However, this testimony is inconsistent with statements contained in documents drafted by the Stewarts and distributed to TeleSTAR's shareholders.

22. TeleSTAR issued a Private Placement Memorandum (PPM) dated January 1984 to explain its proposed operations to prospective investors. Doyal Stewart d

either grant or deny TeleSTAR's applications.

7. Two days later, TeleSTAR filed their remanded Notice of Appearance. They told the Trial Judge that they weren't going to present any further evidence, that their "... present intention under such circumstances would be to decline the invitation to present further evidence and to rest on the record already made, treating the Commission's remand order as in effect a final adverse action."

8. This stated intention left the Trial Judge in a dilemma. The Commission had ordered him to expeditiously take further evidence; he, in turn, had directed TeleSTAR to exchange that evidence on April 6, 1988; but TeleSTAR said they didn't intend to do so, and continued to press for Commission reconsideration.

9. Moreover, the Trial Judge was also aware that no one had asked the

Commission to stay the April 6th prehearing conference date. So he issued still another Order (FCC 88M-731 released March 15, 1988). There he delineated his problem. And he stated that he couldn't, and wouldn't view the Commission's remand order as "merely an invitation to present further evidence."

10. The Trial Judge then said he would address his dilemma by doing two things. First, he gave TeleSTAR an extra week (from April 6th to April 13th) to search out, prepare and submit the evidence the Commission wants, in case they (TeleSTAR) had a change of heart.

11. Secondly, he told TeleSTAR that if TeleSTAR failed to make their evidentiary exchange on April 13, 1988, and if the Commission hadn't stayed the proceeding before that time, he would dismiss TeleSTAR's applications for failure to prosecute. 1

1 The Presiding Officer was well aware that by releasing his Order on

March 15, 1988, he was giving any party to the proceeding more than ample time to ask the Commission to stay the remanded procedural dates. In fact some might view the March 15th order as an invitation to request a stay.

12. When we met on April 13, 1988, the Trial Judge first asked TeleSTAR whether it was prepared to exchange the evidence the Commission had ordered taken. TeleSTAR said no, that it would stick with its original intention, that it had no evidence to submit. The Presiding Officer then confirmed that none of the parties to the proceeding had asked to stay the proceeding. So he carried out his March 15, 1988 pledge: he dismissed TeleSTAR's applications. 2

13. TeleSTAR has deliberately defaulted; so dismissal of their applications is mandated. 3

Further Ruling

Having dismissed TeleSTAR's point-to-point micorwave station applications, there is no need to take any evidence.

SO the evidentiary record IS RECLOSED, and this proceeding IS TERMINATED

FEDERAL COMMUNICATIONS
COMMISSION

Walter C. Miller /s/
Walter C. Miller
Administrative Law Judge

2 The Presiding Officer informed TeleSTAR at the April 13, 1988 session that by allowing its applications to be dismissed for failure to prosecute, as opposed to being denied on the merits, it now faced another hurdle: that the dismissal would moot its December 28, 1987 reconsideration request. TeleSTAR's counsel indicated he was aware of that problem.

3 There is a basic but often overlooked fact involved. The Trial Judge cannot comply with the Commission's Order to hold an expedited hearing if the party that bears the burden of proceeding and the burden of proof refuses to proceed. It's impossible. The ALJ has no contempt powers; he cannot put anyone in jail - not that he seeks such powers. But he will not stand idly by and let TeleSTAR thumb its nose at the Commission's remand order.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 2055

FCC 87-374
37236

In the Matter of)	CC DOCKET	85-202
TeleSTAR, Inc.)	File No. 17	F-P-85
)	through 17	F-P-85
)		
For Authority to)		
Construct Common)		
Carrier Point-to-)		
Point Microwave)		
Radio Stations)		

MEMORANDUM OPINION AND ORDER

Adopted: December 1, 1987
Released: December 3, 1987

By the Commission: Commissioner [redacted] dissents and issuing a statement at a later date.

1. Before the Commission for consideration are (1) a Review of Decision, TeleSTAR, Inc., 2 FCC [redacted] (1987); (2) an Application for Review filed February 9, 1987 and an Erratum filed February 17, 1987 by TeleSTAR, Inc. (3) Oppositions filed February 26, 1987 by MCI

Telecommunications Corp. and by Western Tele-Communications, Inc. (WTCI); (4) a Petition to Retain Pleading in the Record filed February 26, 1987 by TeleSTAR; (5) Comments filed March 6, 1987 by the Chief of the Common Carrier Bureau; (6) Petitions for Leave to Supplement and Supplements to Application for Review, filed April 9 and August 9 and August 20, 1987 by TeleSTAR; 1/ (7) an Opposition filed April 20, 1987 by MCI; (8) an Opposition and Request for Dismissal filed April 20, 1987 by WTCI; 2/ (9) a Motion to Accept Late Filed Comments and Comments, filed August 10, 1987 by the Bureau; and (10) an Opposition filed August 19, 1987 by WTCI.

2. On February 24, 1987, the Common Carrier Bureau served Comments on application for Review on the Administrative Law Judge, the Review Board, and the parties. The pleading was never filed with the Commission's Secretary or distributed to

the appropriate Commission offices. In its March 6 Comments, the Bureau stated that it would "take no position, pro or con, on the Review Board's Decision." TeleSTAR's

February 26 petition asks the Commission to retain the February 24 pleading as part of the record. The petition is granted and the Bureau's pleading will be made a part of the record because it was served on Commission decision making personnel.

3. The Bureau's August 10 Motion to Accept Late-filed Comments and Comments were filed more than six months after the expiration of the filing period specified in 47 C.F.R. 1.115(d). Ordinarily, we would deny such a motion as dilatory if filed by a private party. However, we will make an exception for the Bureau in this case and grant the motion. The Bureau asserts that its late filed Comments are required because of "subsequent Bureau enforcement actions." We decline to accept the Comments for this

reason because the Bureau is not identified or cited any recent enforcement actions in its pleadings. Instead, we grant the motion because we are considering TeleSTAR's basic qualifications, and we find that equity and the public interest will be best served by considering the Bureau's comments. The Bureau's function is to advise and make recommendations to the Commission . . . in matters pertaining to regulation and licensing of communication common carriers," including "adjudication . . . proceedings." 47 C.F.R. (a). Accordingly, we will grant the Bureau's motion and accept its labeled Comments.

I. BACKGROUND

4. This proceeding involves 15 applications filed by TeleSTAR for authority to construct common carrier microwave radio stations connecting Salt Lake City, Utah and Denver, Colorado. TeleSTAR constructed substantial parts of its proposed system without construction permits, thereby

violating 47 C.F.R. 21.3. In pertinent part, section 21.3 provides:

No construction or modification of a station may be commenced without a construction permit, a modified construction permit, or other authority issued by the Commission for the exact construction or modification to be undertaken, except as may be specifically provided for in other sections of this part.

ALJ Walter C. Miller denied TeleSTAR's applications, finding that TeleSTAR willfully violated section 21.3 and intentionally misrepresented material facts to the Commission about its premature construction. TeleSTAR, Inc., FCC 86D-30 (Apr. 18, 1986). The Review Board affirmed that decision, concluding that TeleSTAR willfully violated section 21.3 and that "its principals made serious and numerous misrepresentations to the FCC, and displayed

an egregious lack of candor in this proceeding." 2 FCC Rcd at 13 24.

5. TeleSTAR argues in its Application for Review that the ALJ failed to provide specific demeanor findings to support his candor conclusions. TeleSTAR contends that documents drafted before it started construction prove that its principals did not understand the Commission's processes. TeleSTAR asserts that its principals believed that TeleSTAR could begin constructing facilities, without a specific authorization, immediately after completing the coordinating process for the frequencies to be used; and that it acted in good faith because TeleStar did not in fact begin construction until after the completion of frequency coordination. TeleSTAR's principals wrote letters on June 7 and July 14, 1984 to its shareholders stating that it intended to begin construction before construction permits

were issued. TeleSTAR Ex. 1, Attachments H, I. TeleSTAR argues that its principals would not have written the letters had they known that construction was prohibited. TeleSTAR therefore concludes that it unwittingly violated section 21.3, that its premature construction should not disqualify it, and that it was candid in its representations to the Commission.

6. The Bureau in its February 24 and August 10 Comments urges us to grant TeleSTAR's applications and impose a monetary forfeiture. The Bureau criticizes as inadequate the ALJ's demeanor of TeleSTAR's witnesses indicated that they could not be believed. February 24 Comments at 3-4; August 10 Comments at 4-5. The Bureau contends that the credibility of the witnesses' version of the facts -- that they did not know they were required to obtain Commission approval before beginning construction -- was the ultimate question of

fact which needed to be decided, August 10 Comments at 5, and "[t]here is virtually no direct evidence in the record that undermines TeleSTAR's testimony at the hearing regarding their lack of knowledge of the Commission's preconstruction approval requirement." Id. at 5 n.4. The Bureau urges the Commission to review the record and make its own findings.

7. The ALJ and Review Board relied on documents indicating to them that TeleSTAR's principals knew that preconstruction approval was required. The Bureau asserts that these same documents just as plausibly support the conclusion that TeleSTAR's principals "adopted the mistaken impression that no preconstruction permit was required." Id. at 7, but argues that the evidence provides an inadequate basis for concluding that TeleSTAR's principals knowingly violated the rule against preconstruction. The Bureau suggest

that "the extreme penalty of denial of the applications," Id. at 6, demands a degree of certitude greater than that supportable by the evidence here. Furthermore, the Bureau argues, several mitigating factors are present, including TeleSTAR's inexperience as a common carrier and its clean history of no prior misconduct. Id. at 7.

II. DISCUSSION

8. Burden of Proof: Under 47

U.S.C. 309(e), "[t]he burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission." Where an applicant has peculiar knowledge of the operative facts concerning the alleged misconduct, it must bear the burden of proof as well as the burden of proceeding with the introduction of evidence with respect to the

disputed matters. Granbury Communications Co., 68 FCC 2d 966, 969 (1978). Here, the operative facts with respect to the specified issues are peculiarly within the knowledge of TeleSTAR's principals, and the Hearing Designation Order placed both the burden of proof and the burden of proceeding on TeleSTAR. TeleSTAR, Inc., 50 Fed. Reg. 27055 (published July 1, 1985).

9. Thus, the burden is on TeleSTAR to establish by a preponderance of the evidence both that it is qualified to be a licensee and that the public interest will be served by grant of its applications Steadman v. SEC, 450 U.S. 91, 100-102 (1981). Specifically, at this point in the proceeding, TeleSTAR bears the burden of proving that (1) its premature construction was effectuated without knowledge that the construction was in violation of section 21.3 and (2) that it did not exhibit a lack

of candor or intentionally misrepresent material facts to the Commission.

10. The FCC, however, does not lightly deny any application. The denial of an application is the most severe penalty which we can impose. This, moreover, is a single applicant proceeding for a common carrier license. The applications are not mutually exclusive with other applications. Accordingly, the denial of TeleSTAR's applications will delay service and inhibit the growth of competition in microwave services between Denver and Salt Lake City. This is a close case. As set forth below, there are conflicts and gaps in the record which make it impossible to resolve this proceeding with sufficient certitude to determine whether we should grant or deny TeleSTAR's applications. Although on the face of the record TeleSTAR does not appear to have met its burden of proof, we will remand this proceeding to the ALJ to compile

a more complete record, and to issue a supplemental initial decision.

11. THE ALJ'S Credibility Findings:

A key factor in determining whether TeleSTAR is qualified to be a licensee is the veracity of its principals. The ALJ and the Review Board resolved conflicts in testimony and the candor and misrepresentation issue adversely to TeleSTAR. The ALJ, however, failed to make specific demeanor findings in support of his candor and misrepresentation conclusions. TeleSTAR, Inc., 86D-30, 61-64. Deference is generally given to an ALJ's credibility determinations because he has had a superior opportunity to observe and evaluate a witness, "including the expression of his countenance, how he sits or stands, [and] whether he is inordinately nervous." Penasquitos Village, Inc. v. NLRB, 565 F2D 1074, 1078 (9th Cir. 1977). On the other hand, the Commission can "look only at cold records." Id. The Commission has held

that an ALJ's demeanor determinations "should be supported by some specification to be accorded significant weight." Gulf Coast Communications, Inc., 812 FCC 2d 506 (Rev. Bd. 1979), recon, denied, FCC 81R-11 (Apr. 11, 1981), review denied, FCC 82-128 (Apr. 16, 1982). We find that it is difficult in this case to resolve the conflicts in the hearing testimony based on the reading of a cold record, without the benefit of specific demeanor findings. A remand will assist the equitable resolution of this proceeding because the ALJ will be able to specify particularity the demeanor observations that support his credibility conclusions, which in turn will assist our consideration of the record.

12. TeleSTAR's Applications:

TeleSTAR began constructing its facilities in September 1984. In December 1984, TeleSTAR's outside counsel for communications matters sent TeleSTAR copies

of Part 21 of the rules, which contains the prohibition against premature construction. TeleSTAR Ex. 14. On January 4, 1985, TeleSTAR's president, Noel Stewart, certified TeleSTAR's applications, attesting that he had reviewed the applications and that they were true and complete to the best of his knowledge. The applications represented that "TeleSTAR proposes to construct" its facilities. TeleSTAR's principals did not object to the representation concerning its intent to construct, nor did they advise their FCC counsel that TeleSTAR had started construction. Tr. at 437-44. TeleSTAR's principals do not contest the facts that construction had already begun and attempted to explain the inconsistency by testifying that the application was prepared by outside counsel for communications matters, that he had not seen all of the exhibits when he signed this particular part" of the ,

application. Tr. at 442-43. Counsel was not aware of the construction until after the applications were filed. TeleSTAR Ex. 3.

13. Noel Stewart also certified in the application that TeleSTAR had a copy of Part 21 and that he was "familiar with all rules affecting the proposed operation."

Application Q. 33. However, TeleSTAR later disavowed these certified statements in the applications, admitting they were incorrect and asserting that Noel Stewart had not had an adequate opportunity to read the rules.

TeleSTAR's motion for Summary Decision at 2 (filed Sept. 30, 1985). Noel Stewart later testified that he "had a short time to review the rules" and that he could "not recall reading" section 21.3 or anything which proscribes construction without a permit. TeleSTAR Ex. 1 at 12; Tr. at 33-38. On the basis of the present record, we find that TeleSTAR's certification practices were sloppy and ill-advised, but that these

matters standing alone do not warrant denial of its applications. See WIOO, Inc., 95 FCC 2d 974, 990-91 (1983).

14. TeleSTAR's Pleadings:

Questions also exist as to TeleSTAR's explanations to the Commission in various pleadings concerning its premature construction. It first advanced one explanation for its premature construction and then abandoned that explanation in favor of a conflicting explanation when it became apparent that its initial contentions were inconsistent with the facts. Thus, on March 21, 1985 TeleSTAR filed an Opposition to Petition to Dismiss its Applications, arguing that section 21.3 "is very amenable to misinterpretation" and that it understood section 21.3 of the rules to prohibit the "installation and connection of hertzian wave propagation equipment." TeleSTAR Ex. 1, Attachment K at 30-31. The Hearing Designation Order found that TeleSTAR's

explanation was not persuasive because its construction had already included antennas and waveguides which are "hertzian wave propagation equipment." 50 Fed. Reg. 27055 11 (1985).

15. TeleSTAR then abandoned its initial argument that it misinterpreted the rules in the September 20 Motion for Summary Decision, there TeleSTAR attributed the argument that it misunderstood the Commission's rules to its outside counsel for communications matters. TeleSTAR also argued for the first time that Noel Stewart was not "aware of or had ever seen" section 21.3 before starting construction. Motion for Summary Decision at 2. This new argument conflicted with Noel Stewart's earlier certification that the March Opposition was "prepared under . . . [his] supervision" and that the facts contained in the Opposition were true. TeleSTAR Ex. 1, Attachment K at 85. Noel Stewart explained at the hearing

that the Opposition was prepared by TeleSTAR's communications counsel, that he did not read it until after it was served, and that after reading the Opposition "nothing bothered" him. Tr. at 346. In view of the discrepancies in the evidence reflected above and the fact that the burden of proof is on TeleSTAR, we are unable to resolve these matters favorably to TeleSTAR. Therefore, we find a need for further examination of TeleSTAR's principals and other witnesses concerning the drafting and execution of TeleSTAR's pleadings.

16. TeleSTAR's Knowledge of the Construction Permit Requirement: Noel Stewart and his brother, Doyle Stewart, who is Chairman of TeleSTAR, testified that they believed TeleSTAR could begin construction after the completion of the frequency coordination process even if TeleSTAR had not yet received a written authorization from the Commission. Tr. at 327-29, 528-31.

However, their testimony is rebutted by the record. TeleSTAR distributed a Private Placement Memorandum (PPM) dated January 16, 1984 to explain its proposed operations to prospective investors. Doyle Stewart testified that he drafted the section of the PPM relating to site construction, which states that "construction of the sites will begin upon a preclearance release from the FCC for construction to begin. This order is obtainable from the FCC usually after frequencies have been out on 'user notification.'" Tr. at 518-20; TeleSTAR Ex. 1, Attachment E at 31. The PPM also contained a flow chart indicating that TeleSTAR would get "FCC Pre-Build Orders" before constructing facilities. Id. at 64.

17. Although the PPM used different terminology than the Commission's rules, it conveyed to TeleSTAR's shareholders the message that an affirmative authorization was required from the Commission before

TeleSTAR could start building its facilities. When explaining the language used, Noel Stewart later asserted that he had "no recollection of the 'Pre-Build Order'" mentioned in the PPM. TeleSTAR Ex. 1 at 6. He stated: "Based on information available to us and our impressions, I believed . . . that FCC approval was necessary before radio equipment was installed or operated, but that it was not necessary before site construction began." TeleSTAR Ex. 1 at 5. Noel Stewart testified that his "impression [was] . . . formed without benefit of any expert legal or other advice." Id. It would appear, however, that at least Doyle Stewart had knowledge of the requirements at the time. He admitted to being the author of those sections of the PPM.

16. The Stewarts now argue that they later were led to believe that the FCC's requirements had changed. In this

respect, on April 17, 1984, Noel Stewart wrote TeleSTAR's shareholders that the Commission's processes had been changed and that "the FCC now requires only that a Construction Permit (CP) be obtained and that an application have been filed for frequency licenses." TeleSTAR Ex. 1, Attachment G at 3. In a letter dated June 7, 1984, Noel Stewart described as follows the steps to be taken before licensing and operation:

(1) Prior coordination (User Notification), (2) construction acquisitions and preparations, (3) site acquisition and formal leases on privately owned sites, (4) implementation of Phase II construction (low cost items and pre-fabrications), (5) finalization of User Notification coordination, (6) public notification, (7) FCC granting of CP and final constructions. The letter continued:

Some preliminary constructions of towers and other items will soon be underway.

After the 30-day User Coordination is over--anticipated time-frame is mid July--some private sites will be obtained and the construction phase will begin on certain sites. Upon finalization of public notification and granting of CP by the FCC the construction process will be well underway. Tower and shelter designs are being completed now in preparation for the construction phase.

TeleSTAR Ex. 1, Attachment H at 7. In a letter dated July 14, 1984, TeleSTAR advised its shareholders that the frequency coordination process was nearing completion and that:

After prior coordination, as previously mentioned, a 435 Form will be filed with the FCC for an FCC construction permit (CP). The FCC CP will usually be granted after an

additional 30-day public notice by the FCC. Hopefully, before receiving the FCC CP, most of the private sites will be constructed which will leave 2 - 3 remaining sites to be completed during September after receiving the FCC CP, TeleSTAR Ex. 1, Attachment I at 4.

19. TeleSTAR's letters to its shareholders readily admitted an intention to construct facilities before receiving a permit from the Commission. TeleSTAR argues that this admission established its good faith because it would not have knowingly admitted its intention to construct facilities in violation of section 21.3. Although at first blush this argument has a certain appeal, without further information we cannot fully exonerate TeleSTAR on this basis.

20. TeleSTAR failed to present substantial evidence concerning what caused both Stewarts to mistakenly believe the

FCC's rules had changed. TeleSTAR maintains that Noel and Doyle Stewart's erroneous interpretation of the Commission's rules was developed after meetings with industry representatives. The Bureau supports TeleSTAR, arguing that there is "virtually no direct evidence in the record that undermines the Stewarts' testimony concerning their lack of knowledge of the construction permit requirement." The fact is, however, that the PPM -- which Doyle Stewart admits he drafted -- recognized the need for a "pre-build" order. In order to establish that they were later led to believe this requirement had changed, the Stewarts needed to do more than refer generally to meetings with industry representatives.

21. The burden of proof was on TeleSTAR to establish its qualifications, and here that required TeleSTAR to present persuasive evidence of why it went from

knowing about the FCC's pre-reconstruction rule to thinking that the rule had changed. Yet TeleSTAR failed to present any evidence of who the sources were who supposedly led Noel and Doyle Stewart to develop erroneous interpretations of the Commission's rules. No such witnesses were called to testify. When the Stewarts testified concerning their misunderstanding of the rules, they failed to identify the sources or describe any communications which resulted in those erroneous interpretations. . Tr. at 327-28, 525.

22. The limited evidence in the record of TeleSTAR's industry contacts suggests the opposite. None of the representatives testified they misled the Stewarts. In an affidavit submitted by TeleSTAR, Edsel Davis of Spectrum Planning, Inc. stated: "I know that I would not have said construction without an FCC permit was permissible." Motion for Summary Decision,

Ex. 7; Tr. at 545-46. The testimony of J. Craig Carmen, TeleSTAR's local corporate attorney, who TeleSTAR asked to investigate the question of TeleSTAR's principal's prior knowledge of the rules, does not add much to the picture. Carmen concluded (1) that, the Stewarts were aware of the need for a construction permit when they drafted the PPM, (2) after subsequently meeting with representatives of Spectrum Planning, Inc., they believed that TeleSTAR could start construction after receiving a "Preliminary Clearance Notification" (PCN), and (3) that TeleSTAR in fact did start construction before it received FCC clearance, but after it received clearance from Compucon, Inc. TeleSTAR Ex. 1, Attachment V. Carmen seems to have similarly relied on statements by Noel Stewart that he believed that a "preclearance construction order" was required when TeleSTAR issued the PPM, but - that discussion with consulting contractors

from Spectrum Planning and Compucon caused Joel Stewart to believe that TeleSTAR could start preliminary construction without a commission authorization. Tr. at 273-77. Farman further testified, however, that representatives of Spectrum Planning and Compucon told him that they would not have advised TeleSTAR that it could begin construction without a construction permit. Tr. at 2673-65, 288. The record, however, does not establish the specific nature of any conversations which these representatives had with the Stewarts -- that is, what they did tell the Stewarts or whether they discussed preconstruction at all -- and there is no explanation in the record concerning how or why the Stewarts came to believe they could start construction without a permit.

23. Doyle Stewart's specific explanation of why he thought construction is permissible also leaves unresolved

questions. He testified that he "never
thought the FCC would be . . . concerned
with the actual construction permit that . . .
[he] would be getting from the city and
county wherever we were building." Tr. at
533 (emphasis added). His testimony
reflects confusion concerning Doyle
Stewart's understanding of the various
construction requirements pertinent to
TeleSTAR's application and merits further
inquiry. The gaps in the evidence described
above provide additional reasons why this
case should be remanded for development of a
more complete record, so that we can
determine whether this is truly a case of
misunderstanding or a case of
misrepresentation or lack of candor. Without
further evidence to show that it was simply
confusion, we are unable to find TeleSTAR
qualified to be a licensee.

24. Representations Concerning
When TeleSTAR Discovered Its Construction
Violated the Rules: TeleSTAR maintains that it did not know that pre-construction was not permitted until it was told otherwise by David Irwin, its counsel for FCC matters, and that it ordered construction stopped after consulting with Irwin. TeleSTAR Ex. 1 at 14. TeleSTAR exhibits establish that work on the construction was completely shut down by January 25, 1985. TeleSTAR Exs. 16, 17, 18. In written testimony TeleSTAR claimed that on January 23, 1985, Steve Amundsen (TeleSTAR's director of marketing) was advised by a representative from Compucon that WTCI was inquiring about TeleSTAR's premature construction; that Amundsen immediately called Irwin, who told him that TeleSTAR should stop construction; that Amundsen discussed the Irwin call with the Stewarts; and that TeleSTAR then ordered all construction halted. TeleSTAR Exs. 1 at

23-24; 2 at 6; Tr. at 331, 596-98. Noel Stewart testified that the discovery that the construction violated the rules was a "surprise . . . and a real shock." TeleSTAR Ex. 1 at 13.

25. Irwin, however, testified that he did not learn about the premature construction until a telephone conversation that occurred on January 29. That date is after TeleSTAR stopped construction. Tr. at 694. Irwin's billing slips support his testimony that he discussed the premature construction with Amundsen on January 29. TeleSTAR Ex. 12. He testified that he could not have been notified about the construction on January 23, because the call from Amundsen was overheard by Frank Inserra (an associate) and he also immediately discussed the call with Sylvia Lesse (his partner); and neither Inserra nor Lesse was in the office on January 23. Tr. at 694, 716-17, 900-01.

26. TeleSTAR's testimony is a
in conflict with a predesignation plead-
it filed. In a Response to Request to
Rejection of Applications, filed February
11, 1985 (TeleSTAR Ex. 1, Attachment S)
TeleSTAR represented that Amundsen did
become aware of the inquiries about the
premature construction until January 24
he did not call Irwin until January 29
the same date that Irwin claims he received
the call. The record before us contains
explanation of how or why the Stewarts
Amundsen concluded that the discussion
concerning premature construction occurred
on January 23, 1985. Because the Stewarts
testified that they did not learn about
FCC's prohibition on premature construction
until their conversation with Irwin, the
date of the conversation is significant
because it is uncontested that construction
was stopped on January 25. If, in fact, the
conversation did not occur until January

then the Stewarts evidently had sufficient knowledge to order the construction halted on their own. In the absence of specific information in this regard, we are persuaded that further hearings are in order so that our ultimate determination can be based on a full record as to these questions.

III. CONCLUSIONS

27. As detailed above, the record does not establish TeleSTAR's qualifications to be a licensee. However, this is a single applicant common carrier proceeding and a denial would be inconsistent with our objective to foster new service for the public and the development of competition. Thus, we have determined not to deny TeleSTAR's applications on the basis of a record filled with gaps, inconsistencies, and numerous unanswered questions. 3/ We are remanding this proceeding to the ALJ for the taking of further evidence on the question of TeleSTAR's qualifications. See paragraph

9, above. Such hearings will enable the parties to develop evidence to eliminate the evidentiary gaps in the record, and it will allow the ALJ to provide demeanor findings to support his credibility determinations. The Burden of proceeding with the introduction of evidence and the burden of proof with respect to TeleSTAR's qualifications remain on the applicant. Without further hearings to resolve the unanswered questions regarding TeleSTAR's premature construction, we would have no basis to reverse the conclusion of both the ALJ and the Review Board that TeleSTAR is unqualified to be a licensee. The ALJ is instructed to expedite such further proceedings and to issue a Supplemental Initial Decision. The Supplemental Initial Decision shall be appealable directly to the Commission.

IV. ORDERS

28. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED TO THE Administrative Law Judge for further proceedings in accordance with this Memorandum Opinion and Order.

29. IT IS FURTHER ORDERED That the Petition to Retain Pleading in the Record filed February 26, 1987 by TeleSTAR, Inc. IS GRANTED, and the Comments on Application for Review, served on the parties on February 24, 1987 by the Common Carrier Bureau IS INCLUDED in the record of this proceeding.

30. IT IS FURTHER ORDERED, That the Petitions for Leave to Supplement filed April 9 and August 20, 1987 by TeleSTAR, Inc. ARE DENIED.

31. IT IS FURTHER ORDERED, That the Motion to Accept Late-Filed Pleading filed August 10, 1987 by the Common Carrier Bureau IS GRANTED.

32. IT IS FURTHER ORDERED, That the Petition for Leave to Substitute Opposition and Request for Dismissal filed May 5, 1987 by Western Tele-Communications, Inc. IS GRANTED; and that the Opposition and Request for dismissal filed May 5, 1987 by Western Tele-Communications, Inc. IS ACCEPTED.

FEDERAL COMMUNICATIONS
COMMISSION

William J. Tricarico
Secretary

1/ The supplements seek to call to the Commissions' attention to the Petition for Revocation of FCC Authority filed against MCI by TeleSTAR on April 1, 1987. TeleSTAR has not shown that the petition is relevant to TeleSTAR's qualifications or that it would otherwise warrant any change in our present disposition of this proceeding. We, therefore deny the petitions for leave to supplement TeleSTAR's Application for Review.

2/ On May 5, 1987, WTCI filed a Petition for Leave to Substitute Opposition and Request for Dismissal, and a revised Opposition and Request for Dismissal. WTCI asserts that it filed the revised pleading to remove wording to which TeleSTAR's counsel objected. The petition is unopposed and the revised pleading makes no new arguments. Therefore, we grant WCTI's request and accept its May 5, 1987 pleading.

3/ On the other hand, we wish to make it clear that we would not reach such a result in a case where immediate new service and competition could be provided by grant of a fully qualified competing applicant, as is ordinarily the case in our comparative broadcast proceedings.

